SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1125

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al.,

Petitioners,

vs.

CONTAINER CORPORATION OF AMERICA
and
MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW.

The opinion of the Court of Appeals is not yet officially reported. It is set forth at pp. D2-D8 of the appendix to the Petition for Certiorari ("Pet.") herein. The opinion of the District Court is unreported and is set forth at page D-1 of the Petition.[1]

JURISDICTION.

The jurisdictional requisites are appropriately set forth in the Petition.

QUESTIONS PRESENTED.

The questions presented are:

(1) Whether the Court of Appeals correctly held that an action to enforce an order of the Interstate Commerce Commission brought within one year of the date on which litigation prosecuted by the petitioners to obtain judicial review of that order was completed, was not barred by the one-year limitation provision of § 16(3)(f) of the Interstate Commerce Act.

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[1] The order of the Interstate Commerce Commission which Respondents here sought to enforce, was upheld in *Admiral-Merchants Motor Freight, Inc.* v. *United States*, 404 U.S. 802 (1971), rehearing denied 404 U.S. 987, *Aluminum Company of America* v. *Admiral-Merchants Motor Freight, Inc.*, 486 F.2d 717 (C.A. 7) (1973), certiorari denied, December 17, 1973, *S. S. Kresge Co.* v. *A. & B. Transfer, Inc.*, ... F.2d ...., (C.A. 7) (1973), Petition for Certiorari pending, *Container Corporation of America and Montgomery Ward & Co., Incorporated* v. *Hart Motor Express, Inc.*, U.S.D.C., Dist. Minn., 4th Div., 4-71 Cir. 264 et. seq., November 20, 1972, appeal pending, (C.A. 8).

(2) Whether a class action filed within one year of an order of the Interstate Commerce Commission suspends the statute of limitations for all asserted members of the class, including those who, as the respondents herein, subsequently decide to prosecute their individual actions.

STATUTORY PROVISIONS INVOLVED.

This case involves the Interstate Commerce Act, 49 U.S.C. § 16(2) and (3)(f). Pertinent provisions of that Act are set forth in the Petition, pp. 2-3.

STATEMENT OF THE CASE.

There are facts in the case in addition to those set forth in the Petition for Certiorari which should be brought to the Court's attention.

(a) On January 26, 1970, the carriers sought judicial review of the order of the Interstate Commerce Commission by filing a complaint in the United States District Court for the District of Colorado, seeking a declaration that the order was invalid, and asking for an injunction against enforcement of the refund obligation.

On June 19, 1970, in a Motion For Temporary Restraining Order filed with the District Court in Colorado, the carriers represented that the shippers would incur substantial cost in presenting their claims and therefore, suffer irreparable injury if the I.C.C. order were not enjoined. Thus, the carriers argued:

"12. That in addition to the above costs to the carriers, the shippers would also incur substantial costs in presenting their claims."

"15. And that, unless this Honorable Court restrains the effectiveness, operation and enforcement of said Order, these Plaintiffs, as well as numerous members of the shipping public, will be immediately, substantially and irreparably injured and damaged." (R. A. 4)[2]

(b) On July 6, 1970, the Interstate Commerce Commission sought clarification of the Temporary Restraining Order as it related to the filing of suits and filed the "Motion of the United States of America and the Interstate Commerce Commission for Clarification of Temporary Restraining Order." (R. A. 7-8)

On July 10, 1970, the carriers filed Suggestions opposing that motion and stated:

"The Decision and Order which is restrained is pending judicial review, in limbo. It is ineffective for any purpose. A moment's thought will surely lead to the conclusion that what the government's motion really seeks is a partial effectiveness of the restrained Decision and Order." (R. A. 13)

(c) The filing of a class action on June 15, 1970 on behalf of all shippers who paid overcharges against a class of defendant carriers who were directed to refund such overcharges. *Appleton Electric Company et al.* v. *Advance-United Expressways, et al.*, No. 73-1665, District Court for the Northern District of Illinois, aff'd. January 16, 1974 (C.A. 7), 73-1665.

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[2] References to the appendix to this brief are designated "R.A.".

ARGUMENT.

The decision of the Court below was plainly correct. There is no conflict of decision. In any event, the ruling of this Court in *American Pipe and Construction Co., et al. Petitioners* v. *State of Utah, et al.*, 42 LW 4155, clearly requires a holding that the statute of limitations was tolled as to all asserted members of the class of shippers and carrriers on June 15, 1970, when the action was filed in *Appleton Electric Company et al.* v. *Advance-United Expressways, et al., supra* p. 5.

I.

The decision below is manifestly correct.

The principal argument of the petitioners is that the "statutory limitation provided in Sec. 16(3)(f) is substantive in nature and not a procedural statute of limitations, containing as it does, the words "and not after" (Pet. 9). Accordingly, they argue, the Courts cannot extend the one-year period beyond that provided by the law.

This argument was expressly rejected by this Court in the *American Pipe* case, *supra,* when it held that the one year period of limitations of § 5(b) of The Clayton Act, 15 USC § 16(b), did not bar an action brought after the passage of one year.

In that case, a class action was filed by the State of Utah alleging a Sherman Act conspiracy in the sale of concrete and steel pipe. The suit was filed on May 13,

1969, eleven days prior to the termination of the one year limitations period following the conclusion on May 24, 1968, of civil actions brought by the Government, and was found to be timely under Section 5(b) of the Clayton Act. On December 4, 1969, the District Court entered an order that the action could not be maintained as a class action and that the class action was terminated as of May 13, 1969, the date it was filed. Various members of the class then sought to intervene in the Utah case on December 12, 1969, more than one year after the Government's case was concluded. The District Court denied intervention and held that the period of limitations in Section 5(b) of the Clayton Act barred the suit.

The Court of Appeals reversed and this Court affirmed, holding that the class action filed eleven days prior to the termination of the limitation period suspended the operation of the statute until the day the order denying the class was entered. It then ruled that the motion to intervene on December 12, 1969, eight days after the entry of the order denying class action status, was therefore timely.

There, as here, the contention was made that the federal courts are powerless to extend the limitation period beyond that set by Congress because it is a substantive element of a plaintiff's right to sue and therefore immune from change.

This Court rejected that argument in the *American Pipe* case, *supra,* p. 5 when it declared:

> "The proper test is not whether a time limitation is 'substantive' or 'procedural', but whether tolling the limitation in a given context is consonant with the legislative scheme."

The Court went on to say that,

> ". . . the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."

The Court of Appeals below clearly anticipated this reasoning of the Court when, after tracing the series of delays obtained by the carriers against enforcement of the I. C. C. Order, it declared:

> "In this case, the judicial proceedings did not result in any material change in the Commission's order. However, it was possible that the carriers might persuade the reviewing court to set aside, annul, or sustain, in whole or in part, the order of the Commission. Had the order been changed, an aggrieved party might not ever have been able to prepare or file a proper action until after the court's decision became final. It would be anomalous to hold that a Commission order is final before judicial review is completed if, but only if, review leaves the Commission's order undisturbed."

The Court stated further:

> "No statutory policy will be served by requiring shippers to incur the expense and inconvenience of filing protective suits prior to the termination of the judicial proceedings initiated by the carriers to review the legality of the Commission's order. This conclusion is buttressed by the basic policy to ensure uniformity in treatment of shippers. See *Midstate Horticultural Co.* v. *Pennsylvania Railroad Co.*, 320 U.S. 356, 361. This policy would not be served by allowing recovery to shippers who were prudent enough to file claims during the period of uncertainty, and denying

> recovery to those who justifiably awaited the final determination of the order's validity and enforceability."

In light of the carriers' repeated contentions that the limitations period could not be extended by review of the Commission order to the Supreme Court, the representations they made to the Court in the Denver proceeding cannot be ignored. There, the carriers sought and obtained rulings in that Court which suspended and enjoined the operation of the refund order. They cannot, therefore, argue that the statute of limitations bars the Respondents' suit here where they represented to the Denver Court that unless the order was suspended for all purposes that the shippers would be irreparably damaged, *supra* pp. 4-5.

This Court met this issue head-on in *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959), cited also in the *American Pipe* case, *supra* p. 6. In that case, the plaintiff claimed he was induced to delay his action under a Federal Employers Liability Act three-year limitations period because the defendant represented that he had seven years to sue. The Court declared,

> "To decide the case, we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

II.

A class action filed within one year of an order of the Interstate Commerce Commission suspends the statute of limitations for all asserted members of the class including those who subsequently decide to prosecute their individual actions.

The carriers assert that the Seventh Circuit rejected the Respondents' class action argument. (Pet. 9) They misrepresent the opinion of Judge Stevens since he only referred to this contention in the decision stating that it had been raised by counsel for the plaintiffs as a third alternative argument (Pet. D-6 fn. 9). No ruling was made on the argument. Although the Court did not meet this issue, Respondent here urges this argument raised initially in its Supplemental Brief to the Court of Appeals and in oral argument in support of the judgment below.

In *Appleton Electric, supra* p. 5 a class action was filed on June 15, 1970 on behalf of all shippers who had paid overcharges against a class of all carriers covered by the order here in issue, seeking refunds of overcharges. The District Court issued an order allowing the case to proceed as a class action. The issue of class maintainability went to the Seventh Circuit on an interlocutory appeal and the District Court's decision was affirmed.

Since the Respondents were clearly members of the class of plaintiffs in *Appleton Electric* at the time that case was filed, and all the Petitioners were carriers covered by that Commission order and therefore members of the class of defendants, the statute of limitations was tolled on June 15, 1970, when the complaint was filed in *Appleton Electric.*

The Court's attention is again invited to its decision in *American Pipe, supra* p. 5, where it held that the commencement of a class action suspends the applicable statute of limitations as to all members of the class who would have been parties had the action been permitted to continue as a class. The Respondents' action was commenced on April 27, 1971, at a time during which the statute of limitations of 16(3)(f) was tolled.

III.

The one-year period of Section 16(3)(f) runs from the day the carriers are in default of an I.C.C. order.

Another argument raised before the Court of Appeals by Respondent but on which no direct ruling was made, is urged here again in support of that Court's judgment.

The one-year limitation period described in 16(3)(f) did not begin to run in this case from the date the I.C.C. issued its order for the payment of money. Instead, it runs from the day fixed by the I.C.C. for the carriers to pay the shippers' claims which here was the day the Respondents presented their claims for refund to the carriers supported by paid freight bills or other appropriate evidence.

Sections 16(2) and (3)(f) of the Interstate Commerce Act, when read together, have been held to mean that the one-year period of 16(3)(f) runs from the compliance date fixed by 16(2). Since in this case, the Commission did not set a calendar date for compliance with its order, suits for enforcement of the order may be brought within one year of the date on which the carriers became obligated to make a payment, and this was when the shippers pre-

sented their claims supported by paid freight bills. The respondents filed their claims with the carriers in early 1971, well within the one-year period next preceding the filing date of the complaint, April 27, 1971.

This construction of Section 16 has been consistently followed by the courts for over fifty years and was recently affirmed in *Missouri Pacific Railroad Company* v. *Austin*, 292 F.2d 415, (C.A. 5) (1961). In that case, the I.C.C. issued an order on July 25, 1955 which directed the carrier to pay Western Wood Products Company "on or before September 27, 1955, the sum of $2,659.92 as reparation." The suit to enforce the award was filed on September 27, 1956, within one year of the date required for payment, but more than a year from the "date of the order (July 25, 1955)." There, as here, the carriers contended that the action was barred by the one-year limitation of Section 16(3)(f), but the Court rejected the argument stating:

> "We are clear that the suit to enforce the award was timely filed. It is a literalism in its most artificial extremity to regard—as the Railroad contends—only the literal words of § 16(3)(f) that fixes the period of suit as 'within one year from the date of the order, and not after.' * * *. That approach on statutory construction is, at best, far from decisive. "It is perfectly plain that Congress intended to do three things. First, the Commission was to prescribe a time by which the reparation order was to be paid by the carrier. Second, the carrier was not required to pay prior to that time. And third, the person obtaining the award was to have a year in which to secure enforcement through judicial means if the carrier did not voluntarily comply. These policies would be frustrated were the time for suit measured by the initial date. The actual time available for filing suit would

be something less than a year depending on the interval between the date of issuance of the order and the prescribed date of payment. More than that, this would run counter to all notions of limitations which treats the beginning point as the time the judicially enforceable cause of action accrues. Concededly, suit could not have been filed prior to September 27, 1955. 16(2). No right of judicial action having come into being prior to that time, the one-year period commenced on that date. That is the 'date of the order'." (pp. 418-419)

The construction of Section 16(3)(f) as expressed in *Missouri Pacific* was earlier announced in *Standard Oil Co.* v. *Davis,* 6 F.2d 236 (1925) (D.C.N.D. Cal.). In that case, the court carefully traced the history of early I.C.C. procedure of specifying the number of days within which its orders should be obeyed, the practice of naming a time "on or before" which payment should be made, and how this language was eventually incorporated into Section 16(1). The Court declared at p. 237 of that case:

"Clearly, under the act here, the *plaintiff could not have brought its suit until after the 'effective date' of the order.* Moreover, it might readily happen that for one reason or other the *Commission would postpone the payment until a year after its order.* It is thus seen that the construction contended for by Plaintiff is more reasonable and at the same time in consonance with settled principles relating to statutes of limitations. (emphasis added).

"But it cannot be said that 'the date of the order' under a strict construction, necessarily means the date of its promulgation. The language is equally susceptible of the meaning 'date fixed by the order.' That this is the reasonable and time-honored interpretation is made clear by the language of the Supreme

Court in *Mutual Life Insurance Co.* v. *Hurni Packing Co.*, 263 U.S. 167, 44 S. Ct. 90, 86 L. Ed. 235, 31 A.L.R. 102, where it is said:

"The word 'date' is used frequently to designate the actual time when an event takes place, but, as applied to written instruments, its primary signification is the time specified therein. Indeed, this is the meaning which its derivation (datus—given) most naturally suggests. In *Bement & Dougherty* v. *Trenton Locomotive, etc., Co.*, 32 N.J.L. 513, 515, 516, it is said: "The primary signification of the word 'date' is not time in the abstract, nor time taken absolutely, but as its derivation plainly indicates, time given or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. • • •"

Again, in *Chesapeake and O. Ry. Co.* v. *Walton*, 99 F. 2d 270 (1938), the Fourth Circuit Court of Appeals rejected the carrier's contention that the one-year limitation period began running from the date the I.C.C. issued its order. Suit was filed in that case on December 10, 1937 to enforce an order of October 5, 1936, which order directed payments on or before December 15, 1936. On p. 272 of that case, the Court said:

"On the other hand, the second date (December 15, 1936) has particular significance since it is the point of time at which the duty of the carrier to pay and the right of the shipper to sue both arise."

The decisions in *Missouri Pacific* and in the earlier cases reflect a sensible interpretation of the statute. The courts have seen that a literal reading of the statute would lead to illogical, absurd results and have rejected arguments founded on such analyses. If for example, a Commission order did not require payment within a year of its date, a shipper would have no

opportunity to file its suit and its cause of action would be barred before it had accrued. A similar reading of the statute in this case would require such a nonsensical result if the one-year period is held to have begun on the date of the order. The Appellants' cause of action arose over a year subsequent and the limitation period begins to run from that later date.

Authoritative guidance for the determination of the time a plaintiff's cause of action arises is found in *I.C.C.* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966). There, this Court in adopting the *Missouri Pacific* rationale, said at p. 596:

> ". . . the shipper's § 16 (2) suit must await passage of the date set for compliance."

This is the critical time that gives life to a plaintiff's suit for recovery of moneys due. It is the date its judicially enforceable cause of action accrues and fixes the start of the period of limitation.

In the instant case, the I.C.C. refund order did not specify a calendar date for compliance for the carriers but instead, set a compliance time so as to be ascertainable by the parties. The Commission in its order of August 29, 1969, required:

> ". . . that the respondents will hereafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence."

No obligation on the carriers to pay refunds could arise until properly supported claims were presented to them, and this requirement imposed on the shippers a condition precedent to the creation of their cause of action.

CONCLUSION.

The decision of the Court of Appeals, that the one year period of limitation does not begin to run until litigation instituted by the affected carriers to set aside, annul or amend the I.C.C. order had been concluded, is manifestly correct and consistent with the decisions of this Court in the *American Pipe* and *Glus* v. *Brooklyn Eastern District Terminal* cases.

Moreover, it is clear that the filing of the class action in *Appleton Electric* effectively tolled the statute of limitations for all of the affected shippers and carriers, including the Respondents. Finally, under the decision of this Court in *I.C.C.* v. *Atlantic Coast Line R. Co.* the one year period of limitation would not, in any event, begin to run until the shippers presented their claims to the carriers.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,

Plaintiffs,

vs.

Civil Action No. C-2030

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

MOTION FOR TEMPORARY RESTRAINING ORDER

(Filed June 19, 1970)

Come Now the Plaintiffs, by and through their attorneys, pursuant to the provisions of 23 U.S.C., Section 1336(a), 28 U.S.C., Section 2324, 28 U.S.C., Section 2284(3), and 5 U.SC.., Section 702, and respectfully move this Honorable Court for an Order temporarily restraining the effectiveness, operation and enforcement of the Order of the Interstate Commerce Commission entered in Docket No. 34971, *Increased Rates and Charges, From, To, and Between Middlewest Territory,* 335 I.C.C. 397, as modified by that Commission's Order of August 29, 1969, upon reconsideration, which Order became effective September 29, 1969, in so far as said Order requires or permits the payment of refunds by Plaintiffs.

In support thereof, Plaintiffs would respectfully state and show this Honorable Court as follows:

(Appendix)

1. The complained of Order directs the Plaintiffs to refund, to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence, a portion of the tariff charges collected by the Plaintiffs between April 1, 1968, and September 1, 1969, as is set forth in the Complaint in this Action.

2. An Application is on file with this Honorable Court seeking an interlocutory injunction restraining the enforcement, operation and execution of the refund portion of the subject Order of the Commission.

3. Some shippers, pursuant to the aforesaid Order have filed claims with some of the Plaintiffs demanding refunds.

4. Additionally, several shippers have instituted lawsuits for the enforcement of the Commission's Order in various jurisdictions throughout the country against certain of the Plaintiffs.

5. That the Plaintiffs have not paid the claims pending the appeal and review of the Order of the Commission in this Court.

6. That it is possible that, unless the Order referred to above is stayed and its operation suspended, the Plaintiffs may be subjected to criminal sanctions for their refusal to comply with the Commission's Order.

7. That the multiplicity of lawsuits being brought by the shippers to collect the refunds provided by the Order may result in divergent and conflicting decisions in the various jurisdictions, whereas a final decision by this Court on the merits would be res judicata as to the Plaintiffs involved and would undoubtedly control the action of the unnamed members of the Middlewest Motor Freight Bureau (which included all of the carriers subjected to the refund Order).

(Appendix)

8. That the necessity for defending the multiplicity of lawsuits which is developing would be reduced if the Commission's Order were stayed and suspended, temporarily.

9. That, therefore, the expenses of litigating the question of the validity of the Commission's Order could be substantially reduced by the litigation of that question in a single forum—to-wit, before this Court, for the shippers, the Government and the Plaintiffs.

10. That, unless the Commission's Order is temporarily restrained, the Plaintiffs will be compelled to pay the claims of the shippers.

11. That the accounting and bookkeeping costs to the carriers alone involved in the payment of these claims would exceed the value of the claims.

12. That in addition to the above costs to the carriers, the shippers would also incur substantial costs in presenting their claims.

13. And that, if this Honorable Court ultimately grants relief to the Plaintiffs on the merits of the dispute and enjoins or restrains the enforcement, operation or execution of the subject Order, then the Plaintiffs would be caused the additional expense, under penalty of law for failure to do so, of recollecting the monies paid to the shippers upon their claims.

14. Further, that the subject Order of the Interstate Commerce Commission is unlawful and void.

15. And that, unless this Honorable Court restrains the effectiveness, operation and enforcement of said Order, these Plaintiffs, as well as numerous members of the shipping public, will be immediately, substantially and irreparably injured and damaged.

(Appendix)

16. Entry of the Temporary Restraining Order will also preserve the right of these Plaintiffs to judicial review of the Order of the Interstate Commerce Commission prior to its enforcement against them.

In support of this Motion the Plaintiffs submit herewith affidavits of responsible officials showing the injury and damage which will be incurred by them and their companies should the Temporary Restraining Order not be entered.

Respectfully submitted this 19th day of June, 1970.

/s/ Alvin J. Meiklejohn, Jr.
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(Appendix)

CERTIFICATE OF SERVICE

I, Arthur R. Hauver, one of the attorneys for the Plaintiffs, hereby certify that on this 19th day of June, A.D. 1970, I served a true copy of the foregoing pleading upon the Defendants by mailing the same, first-class or air mail postage prepaid, properly addressed, to their respective representatives of record.

/s/ Arthur R. Hauver

(Appendix)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,

Plaintiffs,

vs.

Civil Action
No. C-2030

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Defendants.

MOTION OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION FOR CLARIFICATION OF TEMPORARY RESTRAINING ORDER

(Filed July 6, 1970)

The United States of America and the Interstate Commerce Commission respectfully move that the Temporary Restraining Order filed herein on June 19, 1970, be clarified in the respects hereafter specified. This Motion is based upon the affidavits filed herein by the plaintiffs and upon the legal authorities cited in the memorandum of the defendants heretofore filed in support of their motion to dismiss.

Paragraph 1 of said Order restrained the operation of the Interstate Commerce Commission's Order "insofar as that Order requires or permits the payment of refunds." Paragraph 2 of said Order restrains all actions and attempts to enforce the Commission order.

However, we have pointed out heretofore that each shipper has rights of restitution, derived from general principles of equity, which would exist even if the Interstate Commerce Commission had never issued a repayment order. This is explained, with supporting citations, at pages 4 through 8 of our memorandum in support of our motion to dismiss.

Our questions are:

A. Does the Temporary Restraining Order forbid shippers, including the United States as a shipper, from bringing an action for restitution based upon general equitable principles and the findings of the Commission on the merits, and not based on an effort to enforce the Commission's repayment order?

B. Does the Temporary Restraining Order forbid any shipper from proceeding with an action for restitution already begun?

The movants herein respectfully suggest that both questions should be answered in the negative. The instant complaint is confined to an attack upon the repayment order issued by the Commission. It does not question the findings of the Commission on the merits of the rate increase. Shippers in at least three actions of which we are aware have filed suit at common law relying on the findings of the Commission and an equitable claim to restitution. To whatever extent they seek, or are entitled to, restitution, they do not seek to enforce a Commission order requiring or permitting a refund. Consequently, we find it hard to believe that this Court intended to enjoin actions *not* based upon enforcing the Commission order complained of herein.

We would further suggest that there can hardly be jurisdiction in this action over shippers other than the United

States seeking to enforce common law rights. The second affidavit by Andrew N. Happer herein shows that many shippers have filed suits in courts outside the District of Colorado. Those plaintiffs are not parties to the present action. Some of them are probably not amenable to service in this District. None, so far as we know, have been served with the Temporary Restraining Order. Moreover, the United States is the only shipper which is a party hereto. We submit that it would be a gross injustice to enjoin one shipper from seeking restitution while hundreds of other shippers are not so enjoined.

Therefore, the movants respectfully pray that the Court supplement its Temporary Restraining Order by making clear that it is to be read according to its literal terms and that it enjoins actions to enforce the Commission's repayment order but not actions for restitution based on Commission findings and general principles of equity.

Respectfully submitted,

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(Appendix)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,

Plaintiffs,

vs.

Civil Action
No. C-2030

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants.

SUGGESTIONS OF PLAINTIFFS IN OPPOSITION TO MOTION OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION FOR CLARIFICATION OF TEMPORARY RESTRAINING ORDER

Come Now Plaintiffs and respectfully file their Reply to the Motion of the United States of America and the Interstate Commerce Commission for Clarification of Temporary Restraining Order.

I.

In its Motion (more in the nature of a brief) the Government asks two hypothetical questions. The Plaintiffs would suggest to this Honorable Court that ruling in advance on abstract propositions is of doubtful wisdom. It can of course also be argued that the Court actually lacks jurisdiction to consider such abstractions but must wait until there is an actual case or controversy before it.

(Appendix)

II.

The language of the Temporary Restraining Order is plain and unambiguous. In partial support of the instant Motion the Government incorporates its argument submitted in connection with its "Motion of the United States of America and the Interstate Commerce Commission to Dismiss the Action". The Plaintiffs will not here attempt to answer the incorporated argument; rather, Plaintiffs will include in their main briefs in the instant action all such argument. Inclusion of this argument in the main briefs will be in compliance with the instructions of this Honorable Court at the time of the Pre-Trial Conference. Actually, the arguments surrounding the Government's Motion to Dismiss go directly to the matters involved in the review of the Commission's Order.

The Restraining Order, entered pursuant to appropriate provisions of the Judicial Code and the Administrative Procedure Act, stays the operation of the Order pending judicial review. This, as recited by the Restraining Order, is to preserve the right of the Plaintiffs to review, to preserve the appeal, to preserve the status quo, and to prevent irreparable injury and damage.

III.

As this Honorable Court would doubtless know, some of the assertions made in the Government's Motion are contested by the Plaintiffs. For example, the Government states that we do not contest the findings of the Commission. So that this matter may be set irrevocably to rest, the Plaintiffs hotly contest the findings of the Commission in so far as they support or are in any way related to the refund order. So far as the general increase for future effect is concerned, this Honorable Court should recall from

the pleadings that the 3-percent and 5-percent increase (depending on size of shipment) was ordered canceled one day and the Commission permitted these Plaintiffs and others similarly situated to put into effect a 6-percent increase on all shipments the following day. There was, therefore, little cause to contest the Order of the Commission requiring the cancellation of the 3-percent and 5-percent increase due to the fact that the carriers got a larger increase the following day.

Additionally, the Government, by inference, argues that there are lawsuits pending against the motor carriers which do not rely on the Commission's refund order. Every lawsuit that we have seen relies to one extent or another on the Commission's refund decision and order. Attached to the Government's Motion of the United States of America and the Interstate Commerce Commission to Dismiss the Action" are three Complaints, filed in various United States District Courts. It will be observed that each of these Complaints relies upon the assailed Decision and Order of the Interstate Commerce Commission, to one extent or another. Attachment No. 3 to that Motion, being the lawsuit instituted by S.S. Kresge Company, is 100 percent to enforce the Commission's refund order. Attachments Nos. 1 and 2 rely to an extent on the refund order, although they have a different theory of action expressed in the Complaints.

Numerically, the majority of the lawsuits filed against the motor carriers as a result of the Commission's Order here under review simply seek enforcement of the Commission's Decision and Order. There are a small number which are based on other theories, but even these rely upon the Decision and Order to one extent or another. In

most instances, as we advised this Honorable Court at the time of the Pre-Trial, the Plaintiffs had voluntarily agreed to stay their actions pending judicial review of the Commission Decision and Order. In some instances they had not. Following the entry of the Temporary Restraining Order other lawsuits have been stayed pending judicial review. There are now something like four or five lawsuits that have not been stayed pending conclusion of judicial review, and in those cases counsel is initiating procedures to attempt to get those proceedings stayed.

IV.

In reality, it appears to Plaintiffs that the Government urges the Court to enter some type of ruling or order which would have the effect of vacating, in part, the Temporary Restraining Order. The supposed common law restitution cases which have been filed against Plaintiffs all rest in large part on the Decision and Order of the Commission which is under review. The Decision and Order which is restrained is, pending judicial review, in limbo. It is ineffective for any purpose. A moment's thought will surely lead to the conclusion that what the Government's Motion really seeks is a partial effectiveness of the restrained Decision and Order.

The briefing schedule has been established. Hearing on the merits of the review and the preliminary motions has been set for October 5. Surely this short period of time to hearing by the statutory Three-Judge Court will not impair anyone, especially the United States Government.

Wherefore, premises considered, Plaintiffs pray the Honorable United States District Court for the District of Colorado to decline to answer the Government's abstract questions, and the Plaintiffs further pray that this Honor-

able Court decline to partially vacate the Temporary Restraining Order, by ruling or otherwise.

Respectfully submitted this 10th day of July, 1970.

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